No. 83-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

REPLY BRIEF OF PETITIONER ON REARGUMENT

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I.

THIS CASE CONCERNS DAMAGES, NOT LIABILITY.

This is a case about damages. The Petitioner has never argued that the First Amendment bars recovery for defamation. What it contends is only that the First Amendment does not permit awards of presumed and punitive damages against any defamation defendant absent "actual malice."

By deciding that all defamation defendants have the same First Amendment rights, the Court would not "broaden *New York Times* beyond even the limits of *Rosenbloom*." (Supplemental Brief of Respondent at 18) The plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), conditioned *liability* on a showing of actual malice in cases involving matters of "public or general interest." 403 U.S. at 43. In contrast, the ruling sought here would permit recovery regardless of the subject matter. Private defamation plaintiffs not subject to the actual malice standard of liability required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), would remain free to recover full compensation for any actual injury suffered. *Rosenbloom* would have prevented most such plaintiffs from making any recovery at all.

Likewise, there is no risk of "constitutionaliz[ing] all state laws of defamation" or "displac[ing] the development of the common law." (Supplemental Brief of Respondent at 27) In actions by private plaintiffs, the States would remain free to set the standard of fault required for recovery of actual damages. In all defamation cases, state law would continue to control such

questions as (1) whether a particular statement is capable of a defamatory meaning, (2) what evidence is sufficient to prove a causal connection between a publication and alleged injury, (3) what evidence is required to establish innuendo, (4) what evidence is required to prove colloquium, (5) when evidence is admissible in aggravation and what its effect should be, (6) when evidence is admissible in mitigation and what its effect should be, (7) when defamation is actionable only upon proof of special damages, (8) what injury would qualify as "special damages," (9) what the measure of damages is for defamation, and (10) what publications are privileged.[1] What the States would not be free to do is to permit juries to award presumed or punitive damages unless calculated falsehood is shown.

A decision that private plaintiffs alleging defamatory falsehood are limited to actual damages absent actual malice would hardly "call into question the government's power to regulate where speech is a component of commercial activity." (Supplemental Brief of Respondent at 39) To the contrary, *the decision would permit the States to regulate defamation to the fullest extent of their interest*: plaintiffs could recover full compensation for any actual injury. Since this case would affect only awards of presumed and punitive damages for defamation, fears of undesired effects in other regulatory contexts are unfounded.

Greenmoss is wrong in contending that the resolution of this case would impact regulation of the type involved in *SEC v. Lowe*, 725 F.2d 892 (2d Cir. 1984).

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[1] A holding that the First Amendment prohibits presumed and punitive damages would not render conditional privileges obsolete. Privilege defenses affect liability, not damages.

The Second Circuit held that Lowe, by virtue of six prior criminal convictions (including several felonies) in connection with his investment advisory business, could be prohibited under the Investment Advisers Act from selling investment advice. Present in *Lowe* was a strong governmental interest in preventing an often convicted criminal from practicing further in a highly regulated profession. No such interest exists in this case. To recognize the limitations of the States' interest in compensating defamed plaintiffs for unknowing, non-reckless falsehood would not weaken regulatory actions in other contexts premised upon overwhelming interests not present here.[2]

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[2] At oral argument last March, Justice O'Connor asked whether this case would affect Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982) and its related Rule 10b-5 (17 C.F.R. § 240.10b-5 (1983)). It would not. Under *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), scienter is an essential element of liability under Rule 10b-5. Scienter is the forebear of actual malice; deceptive intent is the substantial equivalent of actual knowledge of falsity or reckless disregard for the truth. *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1960 (1984). To recover under Section 10b and Rule 10b-5, a plaintiff must also prove actual damage caused by a misstatement or omission of material fact. *See Clark v. John Lamula Investors, Inc.*, 583 F.2d 594 (2d Cir. 1978); *Sackett & Kvan, Inc. v. Beaman*, 399 F.2d 884 (9th Cir. 1968). A ruling for D&B would make the elements of defamation much the same as the elements of securities fraud, with no change at all in the latter. In both instances, First Amendment interests could be overcome by proof of conscious deception or reckless disregard for the truth. Punitive damages are not recoverable for federal securities fraud. *Globus v. Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied* 397 U.S. 913 (1970). The punitive damage aspect of this case would therefore have no bearing on securities laws.

The suggestion that the Fair Credit Reporting Act would somehow be impaired is equally unfounded. That Act does not permit

A. Punitive Damages

Eighty-six percent of the verdict on review consists of punitive damages. Yet Greenmoss relegates the punitive damage issue to a scant three paragraphs of its fifty-two page brief. The reason is quite simple. The verdict is indefensible. This case is a clear example of punitive damages assessed in wholly unpredictable amounts, unrelated to any actual harm, and used selectively to punish an unpopular speaker—an out-of-state financial reporting company. *See Gertz*, 418 U.S. at 350.

Greenmoss tries to avoid the holding of *Gertz* that punitive damages are irrelevant to the states' legitimate interest in compensating injury for defamation. 418 U.S. at 350. It argues lamely that the punitive damages awarded here had nothing to do with defamation. But libel was the only tort alleged. Not even Greenmoss would suggest that Vermont somehow permits an independent action for punitive damages.

The claim that punitive damages were awarded to punish conduct quite apart from the publication ignores the trial court's charge. The trial court framed the issue in terms of the defendant's actions "in publishing the article in question." (J.A. 20) (See Reply Brief of Petitioner at 7-8 concerning the trial court's charge on punitive damages.) By authorizing unlimited, arbitrary damages without regard to knowledge of falsity or reckless disregard for the truth, the charge on punitive damages violated the First Amendment.

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recovery of presumed damages. 15 U.S.C. § 1681 (n), (o) (1982). It limits recovery to actual injury—the same result sought here.

B. Presumed Damages

Failing to explain why the States have a legitimate interest in overcompensating Greenmoss and other private plaintiffs, Greenmoss argues that the trial court's instructions on libel *per se* and presumed damages had no bearing on the verdict and should be ignored. But the jury was told that the "plaintiff *does not need to prove actual damages* resulting from the libel since *damage and loss is conclusively presumed.*" (J.A. 17) (emphasis added). To argue that the jury was limited to awarding damages for actual injury ignores the plain language of the charge.[3] Here, as in *Gertz*, because the "jury was permitted to presume damages without proof of injury," a new trial is required. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 352.

Greenmoss' arguments on sufficiency of the evidence neither cure the defective charge nor avoid the need for a new trial. Moreover, the record provides no evidence of a causal connection between the publication and Greenmoss' alleged lost profits. The company's sole evidence on lost profits came from its former president, John Flanagan. He testified that in the year after the Special Notice, Greenmoss' profits were the highest in its history. (Tr. 143) Without pointing to any lost sales or broken deals, he simply declared that those profits were not as high as Greenmoss had

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[3] Greenmoss paraphrases the charge instead of quoting it. Much is lost in translation. The trial court itself found that while the charge did not compel the jury to award substantial damages, "language in the charge may have misled the jury to believe that damages were presumed in some amount in the case." The charge "permitted the jury to believe that damages could be awarded to the plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the defendant." (J.A. 25-26)

hoped. The only reason he gave for the alleged shortfall was the termination of the Howard Bank's relationship with the company. (Tr. 80)

But Wayne Duprey, the bank officer in charge of Greenmoss' account, testified that the Special Notice had nothing to do with that decision:

Q When you received this Report of Bankruptcy, did you believe it?

A No. I was inquisitive, but not—*I didn't believe it, because I usually follow the Bankruptcy Notices in the paper.*

. . . .

Q *Did you refuse to go forward with the financing because of this Notice?*

A *Not at all.*

Q Did you receive any subsequent Notice from Dun & Bradstreet concerning the financing?

A Yes, I believe within a week later we received a Correction Notice.

Q Did that resolve the situation in your mind or did you have any lingering results?

A It was resolved right after I got it. I'm not sure if Mr. Flanagan had an appointment with me that day, or if I phoned him that day, but we spoke that day regarding the Report and I'm probably the one that informed him that Dun & Bradstreet had, you know, their Report out that they had filed Bankruptcy, and I was assured by John that they were still alive and kicking and weren't bankrupt.

Q So as far as you were concerned, that was the end of it?

A Yes.

. . . .

Q *Did you circulate that Dun & Bradstreet Report to anyone?*

A *No, I did not.* [Tr. 212-13] [emphasis added].

* * *

Q Did you meet with others at the home office to discuss the loan application?

A Yes. I asked two of the senior officers to come out and meet with Greenmoss on this proposal.

Q Did you provide them with a copy of the Bankruptcy Notice of July 26?

A No.

Q As far as you're aware did they learn at all that there were stories about bankruptcy for Greenmoss Builders?

A Not at all.

Q Were you present when this — when the officers of the Bank discussed whether or not the Greenmoss requests for loans should be accommodated or not?

A Yes, I was involved in the meeting, yes.

Q Was Greenmoss' Bankruptcy ever discussed?

A Not to my knowledge it wasn't.

Q Did the Howard Bank decide to go forward with the Greenmoss request for financing, or did they decide not to be forward?

A We declined the request.

Q *Was the fact of the bankruptcy at all a consideration that tended towards the — your Bank's denial of that request?*

A *Not at all.* [Tr. 214-15] [emphasis added].

* * *

Q Could you tell me then, Wayne, why the Howard Bank decided not to accommodate the loan request from Greenmoss Builders in 1976?

. . . .

A . . . The concerns expressed by senior officers who judged this request, they were concerned regarding the high debt to worth ratio, which is a ratio of the total debt of the Corporation divided into their net worth. Their working capital was not sufficient for the level of sales that they had. There were some shareholder loans that either had to be subordinated or converted into equity, and this probably was not possible under Subchapter S. The existing mortgage that we had we felt was the maximum for the value we believe the property had. We would not advance any additional funds on that building. [Tr. 251-253]

* * *

Q *Is it fair then to say, Wayne, that the reason that the loan was declined is that the Howard Bank ultimately decided it was in jeopardy of [not] being repaid should the line of credit be extended?*

A *That was the decision, yes.* [Tr. 254] [emphasis added].

Thus, the Howard Bank knew the Special Notice was erroneous and paid no attention to it. Greenmoss admits that when the bank denied its request, Greenmoss got an even bigger loan from another bank. (Tr. 77-78) Obviously, the Special Notice had no bearing on Greenmoss' profit.

Greenmoss argues that a state's interest is "heightened" when a defamatory report reaches "those with an established relational interest" with the subject. The argument ignores the fact that those with an established relationship with Greenmoss would recognize an error and would most likely call it to Greenmoss' attention.[4] Greenmoss insists that it was more apt to suffer damage here than if the identical words had been published by *The Burlington Free Press*. But a newspaper article would have reached not only many who had dealt with Greenmoss, but also many potential creditors, customers, or suppliers. Where the audience is so small, there is virtual certainty that a prompt retraction can be effective. On the other hand, a retraction in *The Burlington Free Press* might not be noticed by most of those who read the initial false report.

Greenmoss then insists that it has an insurmountable proof problem even though the D&B reports are

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[4] Of course, that is precisely what happened here. Wayne Duprey got the erroneous Special Notice, did not believe it, and discussed it right away with John Flanagan.

sent to the *very* people with whom it has "established relational interests." It suggests that its creditors, bankers, and customers — the very people who would want it to succeed — would perjure themselves to keep Greenmoss from recovering damages justly due. (Supplemental Brief of Respondent at 18) That argument is cynical at best and has neither precedent nor evidence to support it. The problem for Greenmoss is not that actual damage is difficult to trace to D&B. The problem is that actual damage did not exist.

Amicus Sunward's claim that it could not meet the "insurmountable" burden of causation is equally specious. In *Sunward Corp. v. Dun & Bradstreet, Inc.*, No. 82-K-147 (D. Colo. filed January 27, 1982), Sunward won a $3,847,488 verdict based entirely on the doctrine of presumed damages. Sunward's libel claim was based on a D&B report that underestimated Sunward's annual sales and the number of its employees by a substantial percentage. Sunward made no effort to prove any causal connection between the report and a subsequent decline in sales, which the evidence showed was caused by mismanagement and a downturn in the agricultural economy which Sunward served. Instead, Sunward put its own personnel on the stand to testify about rumors of unknown origin that Sunward was in financial difficulty. Sunward's counsel attributed the sales decline to those rumors.

Sunward had available to it through discovery the names of over one hundred recipients of the allegedly defamatory report. Sunward's own records contain the names of its 240 salesmen, 1300 dealers, 26 bankers, nearly 100 suppliers and numerous customers — the persons whom, it was argued, might have acted adversely to Sunward as a result of the report or the rumors. Nevertheless, Sunward called not one report recipient, not one salesman, not one dealer, not one banker, not one supplier, and not one customer to testify that the report or any rumor adversely affected their relationship with Sunward. Instead, Sunward introduced evidence of its decline in sales and, like Greenmoss, "projections" of profits it thought it should have made, and relied completely on the doctrine of presumed damages to prove causation. Far from illustrating a legitimate state interest in permitting awards of presumed and punitive damages absent actual malice, the Greenmoss and Sunward verdicts are perfect examples of unmerited windfalls which over-compensate private plaintiffs and punish unpopular speakers.

Finally, Greenmoss' musings about the confidentiality of D&B's reports are nothing but red herring. The jurisdictions that recognize a privilege for such reports normally require proof that the report be made in confidence. *E.g., Erber & Stickler* v. *R.G. Dun & Co.*, 12 F. 526 (C.C. Ark. 1882); *Hooper-Holmes Bureau, Inc.* v. *Bunn*, 161 F.2d 102 (5th Cir. 1947); *Bradstreet Co.* v. *Gill*, 72 Tex. 115, 9 S.W. 753 (1888). The confidentiality requirement therefore serves state interests. It does nothing to increase or expand the States' legitimate interest in compensating injury for defamation.

II.

"MEDIA"/"NON-MEDIA"

A. Greenmoss' "Guidelines"

In Greenmoss' view, speakers are free to speak only about politics and self-government. What scientists say about science, what artists say about the arts, what scholars say about their universities, and what busi-

nessmen say about business could be censored, banned, and punished if Greenmoss' contention is upheld. Needless to say, this Court's decisions give Greenmoss no support.[5] *See* Supplemental Brief of Petitioner at 32-35.

Greenmoss proposes a mishmash of result-oriented rules to avoid the central inquiry before this court: what interest do the States have in permitting discretionary windfalls of presumed and punitive damages for defamation absent a showing of calculated falsehood? Far from offering a principled approach to the issue, Greenmoss' rules would give different speakers of the same words different constitutional protections depending on the mode of communication, the size or venue of the audience, and other equally irrelevant factors.

The line that Greenmoss urges the Court to draw is a jagged one, if indeed its points connect at all. Though apparently recognizing the problems of *Rosenbloom's* "general or public concern" test, Greenmoss posits its own equally troublesome variation on that theme. According to Greenmoss, First Amendment rights depend on whether speech is "public speech." It defines "public speech" as speech with a "nexus to public affairs." The distinction between speech of that sort and *Rosenbloom's* speech of "general or public concern" is metaphysical at best. Since *Gertz* expressly

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[5] Greenmoss and Sunward both concede that D&B has First Amendment rights. Sunward even asks the Court to "admonish" the States that they "cannot impose liability without fault" against D&B. (Brief of Amicus Curiae Sunward Corp. on Reargument at 5) When Sunward admits that *Gertz's* fault requirement should apply to D&B, it makes no sense to urge that *Gertz's* damage rules should not.

rejected the latter formulation as an inadequate means of accommodating the competing interests at stake in the law of defamation, it is incomprehensible that *Gertz* could be interpreted to espouse the same approach cloaked in slightly different verbiage.

Greenmoss therefore hedges its bet. It serves up another test, relegating the First Amendment to speech "made in public." Under this approach, all those who speak in public are the "media."[6] Others have lesser First Amendment rights.[7] The "media," though, are protected unless what they say reflects "mere public curiosity about private matters" — whatever that means. The distinction between "media" and "non-media" would depend on whether a speaker acts to disseminate his views generally "to the public at large" — whoever that may be. Greenmoss feels no obligation to define its concepts further. It would commit that task to the judiciary, who would doubtless find Greenmoss' "guidelines" too vague to follow.

The suggestion that speech deserves protection only when disseminated broadly has no support. There is nothing in the Constitution or the decisions of this Court that would make speech uttered to a select few on a mountaintop less free than speech shouted in the

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[6] Sunward sees this bright line test in a much dimmer light. Recognizing the difficulties of Greenmoss' analysis, Sunward would divide the world into the protected shores of "media," the bleak plains of "non-media," and the purgatory of "quasi-media." In the next breath, Sunward tells the Court to abandon that mythology altogether. It invites the Court instead to fashion a special category for "business libel," making it easier for corporations than individuals to recover exorbitant windfall damages.

[7] Greenmoss' test may be even fuzzier than this. Apparently Greenmoss would retain First Amendment safeguards for statements about public figures, whether spoken "in public" or not.

marketplace. The size of the audience should have no bearing on the legitimacy of the speaker's First Amendment interests.[8]

The "common sense distinctions" Greenmoss finds between reports by D&B and by the "media" simply will not wash. It would come as a rude shock to journalists that they report no facts but only write opinions.[9] Most of what the *New York Times* prints consists of factual reports without a stated or unstated thesis. If the "main characteristic" of D&B's reports is that "they are primarily factual" (Brief of Amicus Curiae Sunward Corp. on Reargument at 14), that characteristic describes all but the editorial pages of every major newspaper. In fact, Mr. Duprey of the Howard Bank testified at the trial that he read both local newspapers and D&B reports to learn about bankruptcies.[10] (Tr. 212, 230)

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[8] In an effort to discredit D&B's First Amendment interests, Greenmoss cites a recent article by Professor Shiffrin. (Supplemental Brief of Respondent at 22) Shiffrin's myopic view is that the only interest at stake is one of encouraging investment in D&B. He ignores the Court's consideration of the free flow of information in *Virginia State Board of Pharamacy v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748 (1976), no doubt because that would upset the symmetry of his theory. Professor Shiffrin would have done better to consider the interests of the speaker, the audience, and the subject rather than the interests of those who buy the speaker's stock.

[9] While the line between fact and opinion is often difficult to draw, D&B's ratings are plainly matters of opinion. *See* R. Cole, *Consumer And Commercial Credit Management* 346-49 (7th ed. 1984).

[10] Greenmoss' definition does not meet the concerns expressed at oral argument by Justice Stevens and Justice Rehnquist, who asked why the words "Greenmoss is bankrupt" should be more protected when published in a newspaper than when published in a D&B Special Notice. (Oral Argument Tr. 48-49)

Greenmoss is wrong when it characterizes D&B's objections to its vague guidelines as a reluctance to draw lines in First Amendment cases. Line-drawing for the sake of drawing lines serves no purpose. What is needed is a line that properly accommodates the competing interests at stake in defamation. That line was drawn in *Gertz*. Where presumed and punitive damages are concerned, the distinction is between cases of actual malice and cases involving something less. In the former case, the First Amendment may pose no bar to arbitrary, gratuitous awards. In the latter, where calculated falsehood plays no part, presumed and punitive damages are disallowed.

B. Self-Censorship

In arguing that "media" and "non-media" speakers can be distinguished by reference to alleged differences in their respective fears of self-censorship, Greenmoss paints the "media" as a homogeneous, altruistic institution motivated by journalistic ideals alone. But surely Greenmoss is not so naive as to believe that national newspapers and networks are not profit-making enterprises very much concerned with giving their audiences what they want. Certainly those segments of the "media" have flourished no less than D&B. Since Greenmoss readily concedes that profit-making "media" entities legitimately fear self-censorship, the contention that D&B's success somehow insulates D&B from chilling effects is untenable.

Greenmoss contradicts itself when it speculates that "non-media" speakers censor themselves less often than the "media." On one hand, Greenmoss postulates that "non-media" defendants will probably not consider defamation laws before they speak. On the other, Greenmoss insists that these same defendants con-

sciously weigh the legal risks involved in publishing "risky information" and become "emboldened" at the thought that a plaintiff will never pierce their gossamer armor of state privilege or at least will never prove causation.

It is preposterous to suggest that only the "media" would consider the threat of arbitrary, million-dollar verdicts before publishing "risky information." Greenmoss does not explain its unsupported conclusion that speakers like D&B could not "simply decide" to withhold such information because of the risks involved. That argument ignores reality.

To give just one example, D&B might well determine that the risk of publishing criminal history or business failure information about the undisclosed principal of a company is simply too great to justify inclusion of such information in its report. *See* R. Cole, *Consumer and Commercial Credit Management* 351-53 (7th ed. 1984). An individual who has had one or more fraud convictions or business failures leaving unpaid creditors may start a new company in the same line of business as his past ventures. He may shield his involvement in the new corporation by using his wife or children as the sole officers, directors and shareholders. Suppose D&B learns from individuals dealing with the company that the husband appears to be the person running the business and is on the premises regularly. D&B also learns that he is the sole signatory on the corporation's checking account. When asked, however, the corporation (for obvious reasons) denies that he is involved. Like a newspaper reporting on the same facts, D&B would be "chilled" from saying that the husband was a principal in the business and relating his prior convictions or business failures in its report on the company for fear of presumed and punitive damages. Like the newspaper, D&B would no doubt continue to exist, since its reports would still include a variety of information of interest to its subscribers. But that hardly demonstrates a lesser chilling effect.

Although Greenmoss rightly determined not to press the point, Sunward insists that D&B somehow had the burden of proving chilling effect at trial. No court has ever required that to be done as a condition of First Amendment safeguards. If Sunward wants empirical evidence, the verdicts in *Greenmoss* and *Sunward* should be enough. The prospect of such verdicts was all *The New York Times* had to show in *New York Times v. Sullivan*. For further evidence, the Court need only consider the ABA study cited in Greenmoss' supplemental brief: "non-media" defendants face suits more often, stand trial more often, lose more often, and suffer substantial verdicts more often than the "media." Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Am. B. Found. Research J. 455, 457, 467, 471, 473, 497.

III.

COMMERCIAL SPEECH

Greenmoss devotes a large portion of its brief to the proposition that the commercial speech doctrine embraces more than advertising and related promotional activity. It resorts to every strained comparison it can conjure in an attempt to broaden commercial speech to embrace financial reports.[11] What Greenmoss wholly

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[11] For example, Greenmoss' supposed "common ground" of advertising and credit reports as "conveying information" (Supple-

fails to explain, however, is why the contours of commercial speech have any bearing on the resolution of this case.

Contrary to Greenmoss' contention, a holding that the speech at issue here is "commercial speech" is not necessary to preserve a state's power to regulate it.[12] Nor would such a holding empower a state to punish or ban the speech at issue without regard to the interest advanced. Greenmoss' arguments about the "level" of First Amendment protection afforded credit reports cannot change the fact that there exists no legitimate state interest in allowing private plaintiffs to recover presumed and punitive damages for defamation absent calculated falsehood. *Gertz's* damage limitations apply whether commercial speech is involved or not.

Greenmoss contends that the heretofore limited category of commercial speech should now include all "fact-based information about business" published with "a particular profit motive." (Supplemental Brief of Respondent at 42) That definition, of course, covers virtually everything published by *The Wall Street Journal, Forbes,* and *Fortune*, to name a few. Constitutional issues of liability and damages would turn upon judges' (or juries') assessments of whether particular stories should be viewed as "about business" or something more. Despite what Greenmoss says, black and white distinctions would be elusive.

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mental Brief of Respondent at 43) embraces virtually all speech, "commercial" or otherwise.

[12] To take only one example, state regulation of fraudulent conduct does not depend upon a finding that it is "commercial speech."

Recognizing the shortcomings of this approach, Greenmoss and Sunward invite the Court to make a *sui generis* rule for D&B's reports. Those reports, they say, are both hardy and easily verifiable. But D&B is no more hardy than a successful newspaper. And the statement "Greenmoss is bankrupt" is no more verifiable when published by D&B than when published by *The Burlington Free Press.*

CONCLUSION

For all the reasons expressed in this brief and the others filed by the Petitioner, the Court should reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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